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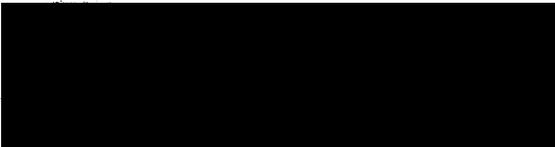
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FILE: WAC 03 056 54856 Office: CALIFORNIA SERVICE CENTER Date: MAR 02 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a school. It seeks to employ the beneficiary permanently in the United States as its chief school administrator. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on December 11, 1998. The proffered wage as stated on the Form ETA 750 is \$55,860 per year. The Form ETA 750 states that the position requires four years of college culminating in a bachelor's degree in education, as well as three years experience in the proffered position or five years experience in teaching.

On the petition, the petitioner stated that it was established during 1987 and that it employs six workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claims to work for the petitioner. The space for the date that employment started was left blank. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Lomita, California.

With the petition, counsel submitted, *inter alia*, an undated letter from the president of an entity that is apparently a school. The name of the entity is in Japanese characters.<sup>1</sup> The president states that the beneficiary worked as a teacher for that entity from July 1, 1992 to September 30, 1995. This office notes that the dates correspond to the period when the beneficiary claimed, on the Form ETA 750, Part B, to have worked for the Keiseijuku school.

Counsel also submitted a letter, dated July 18, 2003, from the petitioner, stating that it has employed the beneficiary since January 1998, first in an administrative position and then, beginning in October 1999 and continuing through the date of the letter, as a teacher.

Counsel submitted no evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date with the petition.

On April 29, 2003 the California Service Center requested evidence in this matter. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also requested that the petitioner provide its California Forms DE-6 Quarterly Wage Reports for the previous three quarters, W-2 forms showing wages it paid to the beneficiary from 1998 through 2002, and a revised employment verification letter detailing the beneficiary's employment history with the petitioner.

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<sup>1</sup> Any document containing foreign language submitted to the Service shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. 8 C.F.R. § 103.2(b)(3). The name of the school in the letterhead is in Japanese. A subsequent submission makes clear, however, that the letter is from the Keiseijuku School, in Hiroshima, Japan. Although the letter submitted did not fully meet the requirements of 8 C.F.R. § 103.2(b)(3), this office shall exercise its discretion and consider its contents.

In response, counsel submitted the petitioner's 1998, 1999, 2000, and 2001 Form 1120 U.S. Corporation Income Tax Returns and the petitioner's California Form DE-6 quarterly returns for the last two quarters of 2002 and the first quarter of 2003. The quarterly returns show that the petitioner employed seven to eight employees during each of those quarters, including the beneficiary.

The 1998 tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$1,818 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$7,757 and current liabilities of \$4,750, which yields net current assets of \$3,007.

The 1999 tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$21,955 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2000 tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$13,074 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$20,094 and current liabilities of \$5,696, which yields net current assets of \$14,398.

The 2001 tax return shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$581 during that year. The corresponding Schedule L shows that at the end of that year the petitioner had current assets of \$24,984 and current liabilities of \$1,914, which yields net current assets of \$23,070.

Counsel also submitted the 1998 – 2002 Form W-2 Wage and Tax Statements. Those W-2 forms show that the petitioner paid the beneficiary \$33,177.25, \$36,000, \$36,000, \$36,000, and \$36,733.33 during those years, respectively.

The director denied the petition on September 19, 2003, finding that petitioner had not shown that the beneficiary has the requisite employment experience as stated on the Form ETA 750, and finding that, because the petitioner had not demonstrated that it was able to pay the proffered wage during 2000, it had failed to demonstrate the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the petitioner had the ability to pay the proffered wage during 2000. Counsel observed that the petitioner paid the beneficiary \$36,000 during 2000 and asserted that the petitioner's ability to pay the balance of the proffered wage is demonstrated by the petitioner's gross receipts, payments to its owner and president, and total wage expense. Counsel stressed the amount of the petitioner's total assets in making that assertion. Counsel stated that the petitioner's owner is always willing to make additional contributions to his company as necessary. Counsel also asserted, but provided no evidence to demonstrate, that if hired in the proffered position the beneficiary would replace the petitioner's owner, who would return to Japan to establish other schools.

In support of the appeal counsel submits a bank statement showing the amount the petitioner's owner had in an account on October 5, 2003.

As to the beneficiary's employment experience, counsel stated that the beneficiary clearly meets the requirement of three years as a school administrator or five years as a teacher. Counsel stated that the beneficiary worked as a full-time teacher at the Keiseijuku School, in Hiroshima, Japan, from April 1986 to March 1990, and for another three years beginning in July 1992. Counsel also stated that the beneficiary began work for the petitioner during October 1999 and that her employment has continued to the present.

The employment verification letter the beneficiary the initially provided from Keiseijuku school states that she worked as a teacher from July 1, 1992 to September 30, 1995. It does not list any prior employment for the same institution. On appeal, counsel submits another undated letter from the Keisei Juku School. That letter states that the beneficiary worked for Keisei Juku School as a full time teacher from April 1986 to March 1990, and from July 1992 through September 1995. This office notes that the beneficiary's revised employment verification is consistent with the beneficiary's revised employment claim.

Counsel provides no explanation for the failure of the original employment verification letter to attest to all of the employment experience the beneficiary now claims to have received at that institution. Further, the beneficiary did not claim on the Form ETA 750, Part B, to have worked as a teacher from April 1986 through March 1990, as counsel now asserts, notwithstanding that the instructions to Form ETA 750, Part B requires the alien to "*list any . . . jobs related to the [proffered position].*"

The revision of an employment history on appeal as necessary to qualify the beneficiary for the proffered position markedly detracts from the credibility of those attesting to that employment history. Both the beneficiary and her affiant have demonstrated the willingness to revise the beneficiary's work history as necessary. Considerable question has now been raised as to the veracity of all claims of employment at the Keiseijuku School. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. I.N.S.*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). This office does not find the revised claim of employment at Keiseijuku School to be credible.

The beneficiary's employment verification letter from the petitioner confirms that the petitioner hired the beneficiary during October 1999. The priority date of this petition, however, is December 11, 1998.

For a petition to be approvable, the petitioner must establish eligibility on the filing date. A petition will not be approved because the petitioner or beneficiary subsequently became eligible. To be eligible for approval, a beneficiary must have all the necessary training, education, and experience specified on the labor certification as of the date that the request for labor certification was accepted for processing by the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Education and experience gained subsequent to the filing date may not be considered in support of the petition, since to do so would result in according the beneficiary a priority date for visa issuance at a time when he is not qualified to perform the duties sought by the petitioner. *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971). The experience the beneficiary has gained while working for the petitioner will not be counted in assessing the beneficiary's eligibility for the proffered position.

The evidence demonstrates that the beneficiary worked for Keiseijuku School as a teacher from July 1, 1992 to September 30, 1995. That is just over three years. No other credible evidence has been submitted to show that the beneficiary worked as a teacher at any other time prior to the priority date. The evidence does not demonstrate that the beneficiary worked as a teacher for five or more years or in the proffered position for three or more years. The evidence does not, therefore, demonstrate the beneficiary's eligibility.

The remaining issue is whether the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns.

Counsel's reliance on the ability of the petitioner's owner to contribute money to the corporation, or to lend it money, or to forego compensation, is also misplaced. The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else.<sup>2</sup> As the owners, stockholders, and others are not obliged to pay those debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it employed the beneficiary and paid her \$33,177.25 during 1998, \$36,000 during 1999, 2000, and 2001, and \$36,733.33 during 2002. Those amounts are less than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

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<sup>2</sup> Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$55,860. The priority date is December 11, 1998.

During 1998 the petitioner paid the beneficiary \$33,177.25. The petitioner must demonstrate the ability to pay the \$22,684.75 balance of the proffered wage during that year. The petitioner declared taxable income before net operating loss deduction and special deductions of \$1,818 during that year. That amount is insufficient to pay the balance of the proffered wage. The petitioner ended the year with net current assets of \$3,007. That amount is also insufficient to pay the balance of the proffered wage. The petitioner has not demonstrated that it had any other funds with which to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 1998.

During 1999 the petitioner paid the beneficiary \$36,000. The petitioner must demonstrate the ability to pay the \$19,860 balance of the proffered wage during that year. The petitioner declared taxable income before net operating loss deduction and special deductions of \$21,955. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 1999.

During 2000 the petitioner paid the beneficiary \$36,000. The petitioner must demonstrate the ability to pay the \$19,860 balance of the proffered wage during that year. The petitioner declared taxable income before net operating loss deduction and special deductions of \$13,074 during that year. That amount is insufficient to pay the balance of the proffered wage. The petitioner ended the year with net current assets of \$14,398. That amount is also insufficient to pay the balance of the proffered wage. The petitioner has not demonstrated that it had any other funds with which to pay the proffered wage during that year. The petitioner has not demonstrated the ability to pay the proffered wage during 2000.

During 2001 the petitioner paid the beneficiary \$36,000. The petitioner must demonstrate the ability to pay the \$19,860 balance of the proffered wage during that year. The petitioner declared taxable income before net operating loss deduction and special deductions of \$581. That amount is insufficient to pay the balance of the proffered wage. The petitioner ended the year with net current assets of \$23,070. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

The evidence submitted does not demonstrate the ability to pay the proffered wage during 1998 or 2000. Therefore, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on that basis. The evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position. The petition was also correctly denied on that ground.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.